STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2005
v	No. 254867 Oakland Circuit Court
RODNEY RASHEEM JONES, Defendant-Appellant.	LC No. 2003-188736-FH 2003-189726-FH 2003-190034-FH 2003-190039-FH

Before: Neff, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of furnishing a false name to a police officer, MCL 257.324(1)(h), resisting and obstructing, MCL 750.479, delivery of less than fifty grams of heroin, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), and delivery of less than fifty grams of heroin, MCL 333.7401(2)(a)(iv). We affirm.[1]

Defendant's convictions arise from incidents on various dates. On December 22, 2002, now-Detective Don Swiatkowski was on uniform patrol as an alcohol enforcement officer in Royal Oak. At approximately 1:30 a.m., he observed a green pick up truck disregard a red traffic light, causing Detective Swiatkowski to initiate a traffic stop. Defendant was the driver of the truck and was accompanied by a male passenger. Defendant appeared to be intoxicated based on his watery eyes, his slurred speech, and the odor of intoxicants. He told officers that he did not have his driver's license with him and gave police the false name of Randy Douglas Jones. Defendant reported that he began drinking "after work" in Ferndale, had consumed three beers, and left when the establishment closed.

[1] Defendant's convictions arise from four separate contacts with police. However, all cases were consolidated, and only one jury trial occurred. Defendant was also acquitted of a felony-firearm charge and an operating under the influence charge, but the jury could not reach a unanimous decision regarding two other offenses. Defendant's sentences are not at issue on appeal.

When a second officer arrived on the scene, Detective Swiatkowski conducted field sobriety tests. Defendant was unable to touch his nose, recite the alphabet, or count backwards as instructed. Based on the failed sobriety tests, defendant was placed in the back of the police vehicle. Although defendant initially complied with the sobriety tests without incident, he became verbally abusive and agitated once placed in handcuffs in the police vehicle. After arriving at the security garage of the police department, Detective Swiatkowski was unable to escort defendant to the main desk because he resisted and struggled with the detective. Consequently, Officer Patrick Clonan and the detective brought defendant from the security garage to the jail. Both men reported that defendant continued to resist in the elevator and pretended to faint. Although defendant pretended to be unconscious, he continued to breathe normally and would open his eyes to see what was occurring around him. Defendant was taken directly to his own cell based on his behavior. During an inventory of the items on defendant's person, approximately thirty-nine packets of heroin were found in his jacket pocket.

Detective Sergeant John Fitzgerald of the Southfield Police Department was assigned to the Oakland County Sheriff Department's Narcotics Enforcement Team (NET). He learned from a confidential informant that defendant was selling heroin. Fitzgerald did not learn of the December incident involving Royal Oak police until the judicial proceedings were initiated and later consolidated. Based on the tip from the informant, Fitzgerald made contact with defendant. On February 20, 2003, defendant was asked to supply Fitzgerald with a "hundo," terminology used to signify a request for $100 of heroin. Carrying a small child, defendant met Fitzgerald on the sixth floor of the Lexington Apartments located in Southfield, Michigan. Defendant told Fitzgerald that the child was "RJ, Junior." They proceeded to defendant's car located in the front parking lot. Defendant placed the child in the back seat, reached into the front dashboard, and gave Fitzgerald 12 bindles of heroin for $100.

On March 3, 2003, defendant and Fitzgerald met at a gas station located at the intersection of Eight Mile and Greenfield. Defendant's child was asleep in the backseat. Fitzgerald entered the passenger seat, and the men exchanged 12 bindles of heroin for $100.

Fitzgerald testified that he decided to coordinate a third purchase of heroin. He testified that the third meeting was established to demonstrate that defendant engaged in a pattern of drug dealing and could not claim that he was performing a favor for a friend or had been "set up" by the informant. On March 5, 2003, Fitzgerald asked defendant to supply $200 worth of heroin. This meeting once again occurred on the sixth floor of the apartment building in Southfield. However, on this occasion, the exchange did not occur in defendant's vehicle, but in the sixth floor hallway. Furthermore, defendant came alone and did not bring his son. Once the exchange of heroin for cash was complete, Fitzgerald gave an arrest signal. Officers began to follow defendant. Although the officers were in plain clothes, their badges were hanging around their necks. Defendant ran up the stairwell to the seventh floor and fled into a locked apartment. Police officers kicked the door in and entered the apartment. They found defendant standing in the hallway. Two females and defendant's son were also present in the apartment. One female, the listed tenant of the apartment and defendant's fiancé, gave her consent to search the premises. The pre-recorded $200 used by Fitzgerald to purchase the heroin was found in the dishwasher. Additional quantities of heroin were found on defendant's person, and marijuana was also discovered. A gun was found in a box in the closet of the bedroom, which also contained both male and female clothing. Police officers opined that, based on their experience,

the marijuana was utilized for personal use. However, the heroin packaging and quantity was consistent with sale rather than personal use.

The jury could not reach a unanimous decision regarding two charges, acquitted defendant of two charges, and convicted as charged with regard to all remaining offenses. Defendant's sole issue on appeal challenges his representation at trial.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). A defendant bears the heavy burden of overcoming the presumption that trial counsel's representation was effective. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Furthermore, a defendant must overcome the presumption that trial counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). When an evidentiary hearing is not held regarding effective assistance, this Court's review is limited to mistakes apparent on the record. *Id*. at 139. The defense may not waive objection to admission of evidence before the trial court, then raise the admission as error on appeal. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). "To hold otherwise would allow defendant to harbor error as an appellate parachute." *Id*. Counsel may not rely on such a procedure in the event of jury failure. *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995). Moreover, decisions regarding the evidence to be presented, the witnesses to be called, and the questions posed are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We do not substitute our judgment for that of counsel addressing matters of trial strategy, and we will not assess counsel's competence with the benefit of hindsight. *Id*. at 76-77. Finally, defense counsel is not required to raise meritless or futile objections. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Defendant contends that the evidence discovered during the search of the apartment must be suppressed because it was obtained without a search warrant and without consent. We disagree. As an initial matter, we note that there is no record[2] evidence to indicate that defendant has standing to challenge the search. The tenant of the apartment, as indicated on the lease, was defendant's fiancé. Contrary to the assertion of defense counsel, she first gave oral consent to search the apartment then signed a written form. Fourth Amendment rights are personal in nature, are not to be asserted vicariously, and apply to the person whose protection was infringed by the search and seizure. *People v Armendarez*, 188 Mich App 61, 71; 468 NW2d 893 (1991). In this case, defendant did not claim a proprietary or possessory interest in the apartment. Rather, at trial, defendant highlighted the fact that the majority of written correspondence identified defendant's residence as a Detroit address. Consequently, there is no indication that defendant has standing to challenge the search. *Id*.

[2] Because there was no hearing in accordance with *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Furthermore, consent is an exception to the warrant requirement when the consent is unequivocal, specific, and freely and voluntarily given. *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). In this case, there was no evidence to controvert police testimony that the consent was freely given. Police denied any intimidation or threats and further denied pointing their weapons at the child. Under the circumstances, the consent operated as an exception to the warrant requirement. *Id*. Therefore, defendant failed to meet the heavy burden of demonstrating ineffective assistance. *LeBlanc*, *supra*. Counsel was not required to file frivolous or meritless motions. *Moorer, supra*.[3]

Defendant next alleges that trial counsel was ineffective for allowing the jury to deliberate and convict defendant of an offense for which he was not formally charged in the information. We disagree. Review of the preliminary examination transcript reveals that, at the commencement of the exam, the prosecutor notified defendant that he would amend the information to include a count of resisting and obstructing a police officer if the evidence supported the charge. At the conclusion of the examination, the prosecutor moved to bindover defendant on the charge, and the district court concluded that there was sufficient evidence to support the bindover on that offense. Accordingly, this challenge to the effective assistance of counsel is simply without merit.

Affirmed.

/s/ Janet T. Neff
/s/ Donald S. Owens
/s/ Karen M. Fort Hood

[3] Defendant contends that the search began before any consent was received as evidenced by the location of the $200 cash in the dishwasher. Our review of the record reveals that police were told about the $200 in the dishwasher. Further, it was adamantly denied that any search was commenced before the receipt of consent. Rather, the chief investigating officer testified that oral consent was received first, then the search commenced. The formality of a written consent then occurred.